83 - 1719

No.

In the Supreme Court of the United States

JOSEPH CUSMANO
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

SHOULD MANAGEMENT'S USE OF ECONOMIC THREATS DURING NEGOTIATIONS WITH LABOR OVER THE TERMS AND CONDITIONS OF EMPLOYMENT BE CONSIDERED CRIMINAL, AS WITHIN THE SCOPE OF 18 USC §1951, THE HOBBS ACT?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH CUSMANO, by and through his Attorney, NEIL H. FINK, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the lower court's judgment of conviction for violation of 18 USC §1951, The Hobbs Act, by extortion.

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals filed March 2, 1984, affirming the District Court's finding of guilt is reprinted in full as Appendix A hereto. That opinion has not, as of this writing, been published. The Opinion of the Sixth Circuit Court of Appeals filed September 17, 1981 (Cusmano I), 659 F 2d 714 (1981) is reported in full as Appendix B hereto.

JURISDICTION

The Opinion and Order appealed from was filed March 2, 1984. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Hobbs Act, 18 USC §1951, provides, in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or effects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this Section shall be fined not more than $10,000.00 or imprisoned not more than 20 years, or both.
>
> (b) As used in this Section — (2) the term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

On April 6, 1977, a Federal Grand Jury, sitting in the Eastern District of Michigan, Southern Division, returned a 2 count indictment charging Petitioner and three co-defendants with violations of 18 USC §1951, The Hobbs Act. Count I charged Petitioner and his co-defendants with conspiracy to violate the Hobbs Act by extortion. Count II charged that Petitioner and his co-defendants' conduct did obstruct, delay and affect commerce by extortionate means.

Petitioner was at all times pertinent to the Indictment half owner of J&J Cartage Company (hereinafter referred to as "J&J"). J&J was engaged in the transportation of steel within the eastern district of Michigan. The company was signatory to the collectively bargained National Master Freight and Central States Area Local Cartage Supplemental Agreement (hereinafter Master Freight Agreement) and the Detroit Area Local Cartage Steel Rider (hereinafter Local Rider). The Local Rider was unique in the steel hauling industry in the Detroit area in that rather than paying the truck drivers on an hourly rate, as is the custom in the industry, drivers were paid based on a percentage of the weight of the steel they hauled. The agreed upon breakdown was sixty percent to the truck and driver and 40 percent to the company. J&J was required by the Master Freight Agreement to make payments to the Teamsters Health Welfare and Pension Fund out of its forty percent.

It had been the policy of J&J that drivers who either owned or were buying their trucks would register as assumed name cartage companies. Many of the drivers did so and in many instances, the driver would buy his truck through the company, that is, the company would actually purchase the truck and the driver would use it while making payments to the company. J&J management had been under the impression

that such assumed name cartage companies qualified as independent contractors such that they were obliged to make their own payments to the union funds. In many instances drivers were aware that the contributions were coming out of their sixty percent. It was, however, later determined that such drivers did not qualify as independent contractors and that the company was obligated to make contributions to the union health welfare and pension funds.

After learning that J&J was supposed to be paying their benefits, drivers attended a union meeting and later drew up a list of demands which they presented to the company. The drivers threatened a wildcat strike unless their demands were met. Meetings were set up between representatives of both management and the drivers wherein management explained that compliance with the demands would necessitate the acquisition of additional office equipment and personnel. It was further explained that such increased cost along with the necessity of keeping up with the contributions to the union fund could prove overly burdensome to the company and could result in either considerable cut-backs or forcing J&J to go out of business altogether.

At a subsequent meeting, the Company offered a compromise in the form of a document called the Supplementary Agreement to Basic Contract and all Supplementary Riders and/or Agreements Attached Thereto and Made a Part Thereof (hereinafter 11% agreement). The proposed 11% agreement provided for an 11% deduction off the gross earnings prior to making the sixty-forty split. The 11% agreement was voted on at that meeting and was defeated.

The defeat of the 11% agreement signalled to J&J management the very real possibility of either a closing of the business or a reduction in the volume of its operations. Such would necessitate a loss or cut-back in employment of drivers with J&J. Consequently, Petitioner spoke individually to the

drivers and explained to them the consequences of meeting their demands. Each agreed to sign the 11% agreement.

The events as described above led to Petitioner's indictment. A Motion for Severance was granted and Petitioner was tried separately on September 20, 1977 before the late Honorable Lawrence Gubow. The case was submitted to the jury and a verdict of guilty was returned on November 5, 1977. Petitioner appealed as of right. On September 17, 1981, the Sixth Circuit Court of Appeals reversed Petitioner's conviction for the reason that certain evidence admitted at trial along with the trial court's jury instructions, constituted a constructive amendment of the indictment in derogation of his rights under the Fifth Amendment.

Petitioner's second trial commenced on April 20, 1982, before the Honorable Patricia Boyle. On June 6 of that year, the jury returned a guilty verdict on both counts. Petitioner appealed this conviction as of right. On March 2, 1984, the Court of Appeals affirmed. A Stay of Mandate was issued pending filing of a Petition for Writ of Certiorari.

REASON FOR GRANTING THE WRIT

The decision below adds a heretofore unrealized dimension to 18 USC §1951, The Hobbs Act,[1] by bringing within the

[1] The Hobbs Act, 18 USC §1951 provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or effects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this Section shall be fined not more than $10,000.00 or imprisoned not more than 20 years, or both.

(b) As used in this Section — (2) the term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

reach of that criminal statute, behavior never previously considered deserving of criminal blameworthiness. In so doing, the court has raised a question of substantial import in Federal criminal jurisprudence, not previously addressed by this Court, to-wit: do the negotiation tactics used by employers while engaged in bargaining with their employees over the terms and conditions of employment constitute extortion within the meaning of the Hobbs Act? Viewed from a different light, is it the proper place of Federal criminal law to enter the area of adversarial business negotiations, where those negotiations are aimed at achieving legitimate business objectives?

The court below erroneously opined that Federal criminal law is entitled to a seat at the bargaining table under these circumstances. That decision failed to recognize the reality that economic threats are methodically placed upon the bargaining table much like chess pieces are strategically positioned about a chess board. The decision below, however, makes such negotiating activity criminal. The decision seriously contravenes this Court's clear holding in *United States* v *Enmons*, 410 US 396 (1973), and the legislative history surrounding the Hobbs Act. The decision should not be allowed to stand without comment.

The position urged by Petitioner is merely an extension of the reasoning underlying this Court's decision in *United States* v *Enmons, supra*. There, defendants were members and officials of a labor union engaged in a strike, over wages, against their employer. In an attempt to coerce management into acquiesing to their demands, defendants committed acts of force against the company which included firing high-powered rifles at company property, draining oil from one of the company's transformers and blowing up a transformer substation owned by the company. *Enmons*, 410 US at 398. These acts of force

formed the basis for the indictment charging defendants with violation of the Hobbs Act.

In analyzing whether such behavior constituted a violation of the Act, Justice Stewart, writing for the Court, placed great emphasis on the fact that the strike was directed at a legitimate labor objective — the obtaining of higher wages. He reviewed the legislative history accompanying passage of the Act and quoted portions of the Congressional record expressing Congress' specific intent not to sweep within the reach of the Act violence committed during a strike aimed at achieving legitimate collective bargaining objectives:

> . . . [T]he bill did not "interfere in any way with any legitimate labor objective or activity."[2] "[T]here is not a thing in it to interfere in the slightest degree with any legitimate activity on the part of labor people or labor unions. . . "[3] *Enmons*, 410 US at 404.

Analysis of these statements as well as others gleaned from the Congressional debate over the Act prompted Justice Stewart to hold, "[t]he legislative framework of the Hobbs Act dispells any ambiguity in the wording of the statute and makes it clear that the *Act does not apply to the use of force to achieve legitimate labor ends*". *Enmons*, 410 US at 401. (emphasis added).

The Court reached this conclusion ever mindful of the acts of excessive force which precipitated defendant Enmons' indictment. In so doing, the Court rejected the argument that the means used (i.e., use of force or violence) in furtherance of legitimate labor objectives is criminal under Federal law pursuant to the Hobbs Act. *Enmons*, 410 US at 411.

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[2] 91 Congressional Record 11841 (remarks of Rep. Walter).

[3] *Id*, at 11908 (remarks of Rep. Summers).

Hence, the enduring lesson of *Enmons* is that so long as the objective sought by either side[4] in a labor-management dispute is legitimate, the means employed to achieve that objective are not within the reach of Federal criminal law pursuant to the Hobbs Act. The court below failed to recognize this.

The decision below rests in large measure on a misinterpretation of the word "wrongful" as used within the meaning of the Act. As interpreted by this Court in *Enmons*, 410 US at 400:

> "wrongful" has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property.

The court below opined that J&J had no lawful claim to the proceeds of the 11% agreement (i.e., Petitioner's objective was "wrongful") because the collective bargaining agreement existing between Petitioner and his employees provided it would be "unlawful and illegal" for J&J to deduct the welfare and pension benefits from the drivers' gross earnings. The court went on to declare the 11% agreement was not the result of collective bargaining between Petitioner and the union, but was instead secured through coercive tactics. *Cusmano II*, Appendix A at 4. In concluding that these factors constituted a violation of the Act, however, the court below blurred the crucial distinction between the means employed by Petitioner, and the objective he expected to reach. To hold, as the court below has, that renegotiation of an existing contract, in attempting to reduce labor costs makes achieving that objective

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[4] In *United State* v *Russo*, 708 F 2d 215, 220, (1983) Judge Holschuh stated in his concurring opinion: "If, then, the Act does not apply to labor union's use of wrongful means to achieve legitimate labor objectives, then certainly the same construction applies to management and the Act should not apply to management's use of wrongful means to achieve legitimate management objectives".

"wrongful" within the meaning of the Hobbs Act is to ignore both Federal labor law[5] as well as hornbook contract law. Thus, as Judge Holschuh, in his "hesitant" concurrence in *United States* v *Russo*, 708 F 2d 215, 221 (1983), wrote, Congress has recognized

> the right of labor and management to seek modifications of a collective bargaining agreement during the life of that agreement...Thus, the fact that a collective bargaining agreement is in effect does not mean that labor and management cannot seek changes in that agreement or that demands or concessions are in any sense unlawful.

As Judge Holschuh further pointed out, while those demands need not necessarily be accepted, the objective of management in seeking lower labor costs (through mid-term modification) is a legitimate objective even though the parties are already contractually bound. *Id.*

It would seem all but absurd to consider reduction of labor costs as anything other than a legitimate management objective. Since this is precisely the objective which prompted the activities leading to Petitioner's indictment, *Enmons* instructs that the Hobbs Act is inapplicable. That notwithstanding, the court below took it upon itself to create new bite in the Act in derogation of both its legislative history and this Court's clear holding in *Enmons*, *supra*.

The court below ignored the teachings of *Enmons* in a further respect. It apparently gave but sparing significance to the fact that, in determining the scope of the Hobbs Act, courts should be ever mindful that they are dealing with a criminal

[5] 29 USC §158(d). National Labor Relations Act. Section 8(d) explicitly sets out terms by which a mid-term modification of a collective-bargaining agreement may be obtained.

statute. Justice Stewart made this more than clear when he admonished: "this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity". *Enmons*, 410 US at 411.

The very effect of the holding below will be to expand the reach of the Act to encompass activities not clearly prohibited by its terms, legislative history or interpretation by other Federal benches. The court below has thus engaged in an exercise of judicial power expressly prohibited by *Enmons*. *Id.*

The decision below establishes a dangerous precedent. Beyond the opprobrium, community disgrace and incarceration Petitioner will be made to suffer as a result of the expansive reading the Act has received below, the decision sets a potential trap for all those engaged in industrial dispute resolution.

It must be recalled that there exist no previous Federal decisions in which the means used to secure a legitimate objective have been allowed to form the basis for a finding of *criminal* wrongdoing. This is precisely what was allowed to occur below however. In so doing, the Sixth Circuit has opened the door to innumerable possibilities by which labor, during the course of heated negotiations, will be able to threaten management with criminal prosecution based upon its negotiation techniques, and vice-versa.

Threats of economic loss are commonplace in labor-management negotiations over the terms and conditions of employment. Labor constantly threatens to shut down an employer's plant by strike if their demands are not acceded to; management counters with the threat of lay-offs, plant operation relocations, plant shut-downs or going out of business altogether. Often these demands are dictated by changes in business activity, newly emerging competition, new technologies or the economic climate of the industry, country or

world market. Whatever the catalyst, the fact remains that as long as they function in an adversarial capacity, labor and management negotiators understand that threats of economic force are a part of their tools in trade.

When such threats are made across the table during collective bargaining sessions, they are considered proper. But when these same threats are offered individually, are they to be made a crime? Moreover, are the men and women who negotiate dispute resolutions in this manner to be made criminals? While such activities may constitute unfair labor practices, it would require an Olympian leap in the current understanding of the Hobbs Act as so interpreted by this Court to reach that result. It would also appear to require a far more precise Congressional mandate than that contained in the language of the Act. "Creating" criminals out of non-criminal activity is precisely the effect the decision below will have however.

Mid-term modification of a collective-bargaining agreement is permitted under Federal labor laws. Reduction of labor costs is not only a plainly legitimate objective of management, it is often a necessary precondition to business survival.

Mindful of these two propositions the decision below cannot withstand close judicial scrutiny. The decision contravenes the legislative history giving rise to the Act, and this Court's prior pronouncements in *United States* v *Enmons*. Review by this Court will insure the Hobbs Act is confined to its intended parameters. Review will insure labor, as well as management personnel, are not snared in the trap created by the decision below. More importantly, review by this Court will settle an issue that, left to stand without comment, will allow essentially non-criminal activity to be subject to the disgrace of criminal sanctions.

CONCLUSION

For the reasons outlined above, Petitioner respectfully requests that this most Honorable Court grant his Petition for Writ of Certiorari, or in the alternative, that the Opinion and Order of the Sixth Circuit Court of Appeals be summarily reversed.

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APPENDIX A

No. 82-1666
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v

JOSEPH CUSMANO,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 2, 1984

Before: Lively, Chief Circuit Judge; Martin, Circuit Judge; and Phillips, Senior Circuit Judge.

Boyce F. Martin, Jr., Circuit Judge. Joseph Cusmano, appeals his conviction for violation of the Hobbs Act, 18 U.S.C. § 1951. Cusmano was charged in a two-count indictment with obstructing, delaying and affecting commerce by extortion in violation of 18 U.S.C. § 1951 (Count 2) and with conspiracy to violate 18 U.S.C. § 1951 (Count 1).[1] A jury returned a verdict of guilty on both counts.[2]

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[1] The Hobbs Act provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be

(footnotes continued on next page)

On appeal, Cusmano argues the conduct charged in the indictment and proven at trial fails to establish a violation of 18 U.S.C. § 1951 because the Hobbs Act does not apply to activities between an employer and employee engaged in discussions concerning a labor dispute over the terms and conditions of employment. He also contends there was insufficient evidence to support his conviction, prejudicial collateral evidence was needlessly admitted at trial, and prosecutorial misconduct deprived him of a fair trial. Because we find no error below, we affirm.

The facts and background of this case have already been set forth in two previous decisions of this court. *United States* v *Cusmano I*, *supra*; *United States* v *Russo*, 708 F.2d 209 (6th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3422 (Nov. 29, 1983). On this appeal, we note that Cusmano and codefendant James Russo were co-owners of J & J Cartage Company, a trucking firm engaged in the transportation of steel. Cusmano, along with the other codefendants,[4] allegedly coerced the drivers of J & J

(footnotes continued from previous page)

fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

[3] Cusmano's first conviction, based on the same conduct at issue here, was reversed because certain evidence admitted at trial, together with the trial court's instructions to the jury, constituted a constructive amendment of the indictment. *United States* v *Cusmano I*, 659 F.2d 714 (6th Cir. 1981).

[4] The convictions of codefendants James A. Russo, Vincent Meli, and Roby G. Smith were affirmed by this court in *United States* v *Russo*, *supra*.

to pay the company's contributions to the Teamster Health and Welfare and Pension Funds by requiring them to sign an "11% agreement." The agreement authorized the company to deduct 11% from gross earnings, prior to computing the drivers' wages, and to use the deducted amount to pay employer contributions to the funds.

Cusmano asserts the 11% agreement was the result of legitimate labor negotiations between an employer and its employees, and cannot constitute a violation of the Hobbs Act. Relying on *United States* v *Emmons*, 410 U.S. 396 (1973), which held that the Hobbs Act does not proscribe "violence committed during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective-bargaining demands," Cusmano contends his conviction must be reversed because the objective behind the 11% agreement — the reduction of labor costs in the form of lower wages — was a legitimate labor objective and therefore was protective activity under *Emmons*. The United States, on the other hand, argues the 11% agreement constituted a wrongful means to achieve a wrongful objective, and thus violated the Hobbs Act.

We believe our earlier decisions in *Cusmano I* and *Russo* affirmatively resolved the issue of whether the Hobbs Act applies to the employer activity involved here. In *Russo* we held that J & J, which Cusmano was half owner of,

> had no legitimate claim to the 'service charge' of 11% of the gross earnings. This is true because the existing contracts expressly required the [c]ompany to make the payments to the welfare and pension funds out of the [c]ompany's own funds. Indeed, the contract provided that it would be 'unlawful and illegal' to deduct the welfare and pension payments from the [drivers'] gross earnings.

Russo, 708 F.2d at 215. Because J & J had no lawful claim to the 11% service charge, we held that the Hobbs Act could be utilized to proscribe the conduct of J & J's officers.

Cusmano argues, however, as did the dissent in *Russo*, that our conclusion on the applicability of the Hobbs Act directly conflicts with the Supreme Court's ruling in *United States* v *Enmons*, *supra*. Cusmano's and the dissent in *Russo's* reliance on *Enmons* is misplaced. In *Enmons* the Supreme Court ruled that a union's violent activities during the course of a legitimate strike, were not proscribed by the Hobbs Act because the legislative history of the statute "makes it clear that the Act does not apply to the use of force to achieve legitimate labor ends." *Enmons*, 410 U.S. at 401. The Court noted, however, that the Hobbs Act would be properly applied in situations "where the obtaining of . . . property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *Enmons*, 400 U.S. at 400. Applied in this manner, the Hobbs Act could be properly invoked where violence or force were utilized to obtain personal payoffs, *United States* v *Iozzi*, 420 F.2d 512 (4th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971), or where violence is used to secure payment for work which was unwanted or fictitious. See *United States* v *Green*, 350 U.S. 415, 417 (1956). Thus, the Hobbs Act presents no bar to prosecution where an accused is alleged to have extorted property to which he has no lawful claim.

Viewed in this light, Cusmano's activities in extracting the 11% agreement from J & J drivers was not protected conduct under the rule of *Enmons*. As an employer, or otherwise, Cusmano had no lawful claim to the money he received from the 11% agreement. As we carefully pointed out in *Russo*, the labor agreement between J & J and its drivers provided that it would be "unlawful and illegal" for J & J to deduct the welfare and pension payments from the drivers' gross earnings.

Moreover, the 11% agreement was not the result of any collective bargaining between J & J and the union, but instead was secured through the coercive tactics of Cusmano and his codefendants. *Russo* 708 F.2d at 215.

We believe Cusmano's attempt to characterize his behavior as protected labor activity stretches *Emmons* too far. He claims he had a legal right to bargain with his employees in an attempt to reduce J & J's labor costs. Although he might have this right, the facts proven at trial do not establish any legitimate bargaining by Cusmano in an attempt to reduce J & J's labor costs. Instead, the evidence discloses that he and his codefendants coerced the J & J drivers into an illegal agreement with required the drivers to pay for pension contributions which Cusmano should have paid. The facts demonstrate Cusmano attempted to obtain by wrongful means and under the guise of a "service charge" an objective which the parties' own contract specifically declared "unlawful and illegal." *Russo*, 708 F.2d at 216 (concurring opinion). This conduct went beyond legitimate labor tactics and violated the Hobbs Act. *Cf. United States* v *Provenzano*, 334 F.2d 678 (3d Cir. 1964), *cert. denied*, 379 U.S. 947 (1964); see also *United States* v *Iozzi, supra*, 420 F.2d at 515. Applying Cusmano's interpretation of 18 U.S.C. § 1951, the Hobbs Act would pose no bar against the utilization of sham agreements, even though such agreements were obtained outside the traditional labor/management bargaining context. We decline to adopt such a restricted view and believe that *Emmons* provides no sanction for the activities proven here.

Cusmano further contends prejudicial collateral evidence was needlessly admitted at trial. First, he complains that the district court improperly allowed the government to introduce evidence regarding the bankruptcy proceedings of J & J. Cusmano argues this evidence was irrelevant and unduly prejudicial as evidence of another crime extraneous to the charges

against him. The government asserts this evidence was properly admitted under Fed. R. Evid. 608(b) to impeach the credibility of Cusmano. We find the district court did not abuse its discretion in admitting this evidence for purposes of impeachment. Throughout the direct examination, Cusmano testified about the close business relationship he had with his employees. He also testified extensively about the economic collapse of J & J Cartage Company. In light of this testimony, the United States was in a proper posture to challenge the credibility of Cusmano. This challenge took the form of proof of how he was able to eventually transfer all the assets of J & J to his own personal account, leaving the trucking firm with no assets. Thus, the evidence of J & J's bankrupt proceedings was properly admitted.

Cusmano claims further the district court erred when it permitted the Assistant United States Attorney to secure from him an admission that he had physically assaulted a tow truck driver in charge of towing one of J & J's trucks to a Michigan State Police truckyard in Roseville, Michigan. On direct examination Cusmano stated he had "never threatened anyone in my life including my drivers who were my friends or intended to be." Cusmano now claims he made this statement in the context of economic threats to his employees. While this remark may have been limited, the broad nature of the comment, considered together with Cusmano's other testimony, could certainly have suggested that Cusmano had never threatened anyone. Therefore, it was properly allowed as evidence rebutting Cusmano's direct testimony. See Fed R. Evid. 608(b).

He also asserts the district court erred when it permitted the United States to introduce evidence regarding the reputation of codefendant Vincent Meli. As we noted in *Russo*, 708 F.2d at 208, this evidence was admitted solely for the purpose of

showing the state of mind of the victims of the alleged extortion at the time they consented to the 11% agreement. We find no abuse of discretion in the admission of this evidence.

Finally, Cusmano contends prosecutorial misconduct deprived him of a fair trial. In support of this contention Cusmano claims the Assistant United States Attorney repeatedly sought to introduce prejudicial evidence and constantly attempted to humiliate him. We see no support for this claim. In *United States* v *Leon*, *supra*, 534 F.2d at 679, we noted we must

> consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused.

Cusmano has failed to meet this test. The record contains sufficient evidence to support the convictions reached below. *Glasser* v *United States*, 315 U.S. 60 (1942); *United States* v *Leon*, 534 F.2d 667, 676 (6th Cir. 1976)

The judgment of the district court is affirmed.

APPENDIX B

659 FEDERAL REPORTER, 2d SERIES 714

UNITED STATES of America,
Plaintiff-Appellee,

v.

JOSEPH D. CUSMANO,
Defendant-Appellant.

No. 79-5364.

**United States Court of Appeals,
Sixth Circuit.**

**Argued April 17, 1981.
Decided and Filed Sept. 17, 1981.**

Before LIVELY, KENNEDY, and BOYCE F. MARTIN, Jr., Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

Joseph Cusmano was convicted in the Eastern District of Michigan of both conspiracy to violate and a substantive violation of the Hobbs Act, 18 U.S.C. §1951.[1]

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[1] The Hobbs Act provides, in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

* * * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Cusmano was the founder and half owner, along with codefendant James Russo, of the J & J Cartage Company, a trucking firm engaged in the transportation of steel. The other codefendants were Vincent Meli, an employee of the company, and Roby Smith, the business agent for Teamsters Local 299. The indictment charged that Cusmano, Russo, Meli, and Smith conspired to and did in fact obstruct, delay, and affect interstate commerce through extortion.[2] The codefendants allegedly coerced the drivers to pay the company's contributions to the Teamster Health and Welfare and Pension Funds by causing them to sign a so-called "11% agreement." The agreement authorized the company to deduct 11% from gross earnings, prior to computing the drivers' wages, and to use the deducted amount to pay the employer contributions to the funds.

Cusmano makes several arguments on appeal. We only address one of those arguments, because our decision on the issue it raises requires us to reverse his conviction.

Cusmano contends that certain evidence admitted at trial, together with the trial court's instructions to the jury, constituted a constructive amendment of the indictment, depriving him of his Fifth Amendment right not to be prosecuted except on charges set forth in a grand jury indictment. We agree.

Count One of the indictment stated as follows:

> [The codefendants] did knowingly and willfully conspire, combine, confederate and agree together, and with each other, and with persons unknown to the Grand Jury, to obstruct, delay and affect interstate commerce, as that term

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[2] Cusmano's motion to sever was granted, and he was tried first. His codefendants have since been convicted on both counts, and their appeals are pending in this court.

is defined in Section 1951 of Title 18, United States Code, and the movement of articles and commodities, that is, steel and steel products, in such commerce, and did attempt to do so by extortion, to-wit: by threats of economic loss, that is to say, the defendants did force the drivers who were employees, agents, and owner-operators of the Company to pay the Company employer contributions to the Funds with their consent induced by the wrongful use of force and fear, in that the defendants did threaten certain drivers of the Company with unprofitable truck loads, the loss of their jobs, and the loss of equity in their equipment unless they agreed to the deduction from their weekly gross earnings.[1]

[1] It is clear that the indictment alleges only one means of extortion: threats of economic loss. The "wrongful use of force and fear" constituting the extortion element of the offense is particularized — the drivers were threatened with unprofitable loads, the loss of their jobs, and the loss of equity in their equipment. There is no allegation that the employees' consent to the 11% agreement was induced by the wrongful use of actual or threatened physical violence. Such conduct is not a necessary element of a Hobbs Act conviction; it is well settled that fear of economic loss is sufficient to support a conviction under the Act. See *United States* v *Enmons*, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973); *United States* v *Brecht*, 540 F.2d 45 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed. 2d 573 (1977); *United States* v *Addonizio*, 451 F.2d 49 (3rd Cir.), *cert. denied*, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972).

As the government points out in its brief, however, fear of economic loss was not the only kind of fear that the witnesses were permitted to describe. Evidence was admitted at trial of

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[1] Count Two of the indictment alleged the same conduct as a substantive offense.

the employees' fear of physical violence as well. John Gemelli, one of the truck drivers, testified that he had heard that codefendant Meli was involved in the Mafia and was not one to "fool around" with. Gemelli also stated that he was concerned for his family, and that his mother-in-law had received a threatening phone call. Cusmano moved during Gemelli's testimony for a mistrial, and in a supporting memorandum contended that the evidence as to Meli's character was inadmissible, highly prejudicial, and irrelevant to prove the fear of economic harm alleged in the indictment. In its opinion denying the motion, the trial court first stated that it would give a cautionary instruction. Addressing Cusmano's claim that the evidence was irrelevant, the court stated:

> First, a reference to Meli as an affiliate of the "Mafia" does not necessarily connote solely a "physical" threat — it may well convey the ability to enforce an economic threat, perhaps through physical means, perhaps through commercial means. The court deems the information probative since it may assist the jury in their determination of whether there existed in the witness' mind a reasonable fear of economic loss. The fear in the mind of the alleged victim may be a product of potential economic loss, potential physical harm, or a hybrid of the two. Second, the court does not find that the proofs are fatally variant from the charges of the indictment. See, *United States* v *Mills*, 366 F.2d 512, 514 (6th Cir. 1966). The defendant in this case has been afforded substantial discovery, thereby minimizing the potential for surprise or for being misled. In the leading case on fatal variance, *Stirone* v *United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L.Ed.2d 252 (1960), the prosecution relied on facts at trial that were much different from those enumerated in the indictment. Such is not the case here. It is conceivable here that the existence of fear in the alleged victim's mind was related to economic loss as well as

> physical harm — under certain circumstances it is apparent that the two forms of coercion may be inextricably tied. *That is not to say that the government will be allowed to prove a case of extortion by physical threats, which was not charged in the indictment.* It is difficult for the court, at this time, to foresee what proofs are forthcoming. Hopefully, the aforementioned rationale will assist the government in recognizing their limitations, the defendant's motion for a mistrial is hereby denied.

(Emphasis added)

It is clear that at this point in the trial the court intended to limit the government's proof to the charges set forth in the indictment. The trial judge obviously believed that the evidence of Meli's Mafia connection connoted a threat of physical violence. He cautioned the jury to consider that evidence only as it bore on Gemelli's state of mind. The court reasoned that the evidence would assist the jury in determining whether there existed in Gemelli's mind a reasonable fear of economic loss.[4]

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[4] In addition to the testimony of Gemelli, there was other evidence of threats of physical violence, admitted to show the state of mind of the J & J Cartage employees.

Carl Ottman, another driver, testified that Meli's reputation had a bearing on Ottman's decision to sign the 11% agreement. He stated that Meli represented the "muscle" of the company, available "to enforce anything that they wanted to impose upon the drivers."

Perhaps the most significant testimony relating to the employees' fear of physical violence was the testimony of James Morisette, a former business agent of the union. Morisette's job was to collect contributions to the union pension and health and welfare funds from employers whose accounts were delinquent, and to collect union dues. One of the companies to which Morisette was assigned was J & J Cartage. Sometime around April of 1972 he was assigned to other companies, and his duties with respect to J & J Cartage were assigned to Roby Smith, one of Cusmano's codefendants in this case.

(footnotes continued on next page)

In contradiction to its earlier statement that the government would not be allowed to prove a case of extortion by physical threats, the court gave the following instructions to the jury:

> Now, as to the second element of the Hobbs Act violation, that is, the use of extortion, I instruct you that the law as it relates to this case defines extortion as the obtaining of property from another with his consent, where that consent was induced by the wrongful use of threatened force, violence, or fear. The mere taking of property not induced by these fears would not constitute extortion.
>
> * * * * * *
>
> The term "fear" as used in these instructions has the commonly accepted meaning. It is a state of anxious concern, alarm, or apprehension of anticipated harm. The term "fear" as used in these instructions not only encompasses fear of economic loss or damage to certain employee

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Morisette testified that while he was the business agent assigned to J & J, he encouraged employees who had complaints to submit written grievances to the union, but no grievances were filed. Morisette said that later, apparently after he ceased being the business agent assigned to J & J Cartage, he talked with former J & J drivers about why grievances were never filed. The reason they gave was that a lot of them were threatened, and that none wanted to have his "head busted." In its closing argument, the government stated that Morisette's testimony helped "to show you what the atmosphere was [at J & J Cartage] as far back as early 1972."

Michael Pomper, a driver, testified that he was dissatisfied with the provisions of the 11% agreement. He asked his attorney to check into the agreement. The attorney's initial response was that he could not believe that J & J Cartage was trying to do this to the drivers, and that he felt Pomper had a good case. However, a week or two later, the attorney called Pomper back, and according to Pomper, "what he said was that I didn't tell him Vince Meli was working there, and there was nothing he could do for me."

drivers of J & J Cartage Company but also fear of physical violence.

Thus, if the defendants deliberately and intentionally played upon an individual's reasonable fear of force, violence, or economic loss to obtain money from that person or persons the defendants have committed extortion.

* * * * * * *

In connection with what I have just said about extortion through the use of fear, I instruct you that if you, ladies and gentlemen, find beyond a reasonable doubt that the defendant deliberately and intentionally utilized another person's reasonable fear of actual or threatened force or violence, or of economic loss, to obtain property from that person, extortion has been commited.

* * * * * * *

Keep in mind in deciding the issues it is the burden of the Government to prove the defendant's guilt beyond a reasonable doubt. In order to prove the defendant's guilt the Government must also prove beyond a reasonable doubt that the defendant attempted to obtain the property by threats of force or violence or fear of economic harm.[5,6]

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[5] Cusmano objected to these instructions, and to the court's failure to give Defendant's Proposed Jury Instruction #32, which provided:

It is stated in the indictment that the alleged extortion was committed solely by means of threats of economic loss, namely, that the drivers would be given unprofitable loads, lose their jobs and the loss of equity in their equipment unless they agreed to the deduction of eleven percent from their gross earnings.

Accordingly, if you conclude that threats of another nature were made, you are to disregard such evidence as it is irrelevant to the charges. *United States v. Addonizio*, 451 F. 2d 49 (3rd Cir. 1972), *cert. denied*, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed. 2d 812 (1972), *reh. denied*, 405 U.S. 1048, 92 S.Ct. 1309, 31 L.Ed. 2d 591 (1972).

(footnotes continued on next page)

[2] Except as to matters of form or surplusage, there is a per se rule prohibiting judicial amendments to the terms of an indictment. *Watson* v *Jago*, 558 F.2d 330, 334 (6th Cir. 1977); *United States* v *Fruehauf*, 577 F.2d 1038, 1056 (6th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978); *United States* v. *Beeler*, 587 F.2d 340, 342 (6th Cir 1978). The rule began as a prohibition of formal alterations of the wording of an indictment. *See Ex Parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887). In *Stirone* v. *United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Supreme Court held that events at trial can effectively amend an indictment, requiring reversal of a conviction even in the absence of a formal amendment. The *Stirone* indictment alleged a Hobbs Act violation which affected the movement of sand in interstate commerce. Over the defendant's objection, the trial court allowed the government to present evidence of an effect on interstate commerce in steel as well as in sand. The jury was instructed that interference with interstate shipments in either sand or steel could constitute the interstate element of the offense. In reversing the Court of Appeals' affirmance of Stirone's conviction, the Supreme Court wrote:

> The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also *United States* v *Norris*, 281 U.S. 619, 622, 50 S.Ct. 424, 425, 74 L.Ed. 1076. *Cf. Clyatt* v *United States*, 197 U.S. 207, 219, 220, 25 S.Ct. 429, 432, 49 L.Ed. 726. Yet

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* There are segments of the court's instructions which are consistent with the allegations of the indictment. *See* App. 629, 630, 621, 634, 637. However, we feel that, viewed as a whole, the charge left the jury with the impression that a finding of extortion could be based on a finding of threats of physical violence alone — extortive means not alleged in the indictment.

the court did permit that in this case. The indictment here cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States nor does the Court of Appeals appear to have so read it. The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. Compare *Ford* v *United States*, 273 U.S. 593, 602, 47 S.Ct. 531, 534, 71 L.Ed. 793; *Goto* v *Lane*, 265 U.S. 393, 402, 44 S.Ct. 525, 527, 68 L.Ed. 1070. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare *Berger* v *United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

Id., 361 U.S. at 217-18, 80 S.Ct. at 273-74 (footnote omitted).

[3] This court has adopted the District of Columbia Circuit's test for distinguishing between constructive amendments to an indictment and mere variances in proof:

> An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

Gaither v *United States*, 134 U.S.App.D.C. 154, 413 F.2d 1061, (1969). See *United States* v *Fruehauf Corp.*, *supra*, at 1056; *Watson* v *Jago*, *supra*, at 334.[7]

[4] The events at Cusmano's trial effectively altered the charging terms of the indictment, thus destroying his right to be tried only on the charges set forth in the indictment. As the Supreme Court pointed out in *Stirone*, *supra*, 361 U.S. at 218, 80 S.Ct. at 273, there are two essential elements of a Hobbs Act crime: interference with commerce and extortion. "Neither is surplusage and neither can be treated as surplusage." *Id.* It follows that when one means of extortion is charged, a conviction must rest on that charge and not another, even if it is assumed that under an indictment drawn in general terms a conviction might rest upon a showing of either form of extortion. *Cf. Stirone*, *supra*, 361 U.S. at 218, 80 S.Ct. at 273. We cannot know whether the grand jury would have included in its indictment an allegation of extortion through threats of

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[7] *See also United States* v *Beeler*, *supra*, which articulated the following test: "Variances which create 'a substantial likelihood' that a defendant may have been 'convicted of an offense other than that charged by the grand jury' constitute constructive amendments. . . . *United States* v *Somers*, 496 F.2d 723, 744 (3rd Cir. 1974)." 587 F.2d at 342.

physical violence. The admission of evidence of such extortion, together with the trial court's instructions, indicate that this might have been the basis of Cusmano's conviction. If so, he was convicted on charges the grand jury never made against him. This was fatal error. *Id.* at 219,* 80 S.Ct. at 274. *See also United States* v. *Jones*, 647 F.2d 696 (6th Cir. 1981); *United States* v. *Wood*, 609 F.2d 246 (6th Cir. 1979).

The judgment of the District Court is therefore reversed.

CORNELIA G. KENNEDY, Circuit Judge, dissenting.

I respectfully dissent. Assuming that the majority is correct in holding that the charge to the jury does not accurately reflect the indictment, I would hold that permitting the jury to

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* The government, citing *United States* v. *Iozzi*, 420 F.2d 512 (4th Cir. 1970), *cert. denied*, 402 U.S. 943, 91 S.Ct. 1607, 29 L.Ed.2d 111 (1971), asserts that there was no fatal variance in this case. The *Iozzi* indictment charged extortion through the wrongful use of fear of financial and economic injury. Evidence at trial showed threats of force and violence. The Fourth Circuit noted that there was no suggestion that the evidence surprised defense counsel, and that the evidence was probative of a fear of economic injury induced by threats of violence. Significantly, the court noted that the trial court "carefully followed the language of the indictment in charging the jury that in order to convict, it was essential for the government to show that Iozzi obtained money, or attempted to do so, through the wrongful use of fear of financial and economic injury to the contractors' businesses." *Id.* at 516.

The government analogizes to *Iozzi* and distinguishes *Stirone* by stating that the trial court carefully followed the language of the indictment in charging the jury as to the extortion element. We agree with appellant that this is simply not true. The portions of the charge excerpted above clearly demonstrate that the jury was permitted to base a conviction on a form of extortion not alleged in the indictment.

Because the evidence as to actual and threatened physical violence may have been relevant to the employees' fear of economic loss, *see, e.g.*, *United States* v. *Billingsley*, 474 F.2d 63 (6th Cir.), *cert. denied*, 414 U.S. 819, 94 S.Ct. 42, 38 L.Ed.2d 51 (1973), it is at least arguable that there was no variance at all. That question, however, is not before the court.

convict if it found that defendant used threats of physical harm did not so change the basic theory of the alleged conspiratorial agreement as to constitute an amendment. Our Circuit has stated the purposes underlying the rule against constructive amendments: notice to the defendant of the charges he will face at trial; notice to the court so it may determine whether the facts alleged are sufficient to support a conviction; prevention of further prosecution for the same offense; the assurance that a group of independent citizens have reviewed the allegations and determined that there is enough of a case to send to the jury. *United States* v *Beeler*, 587 F.2d 340,342 (6th Cir. 1978). The crime charged in the indictment, particularly with respect to the conspiracy, was the same as described in the charge to the jury. As the United States Supreme Court stated in *Glasser* v *United States*, 315 U.S. 60, 66, 62 S.Ct. 457, 463, 86 L.Ed. 680 (1942):

> The particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of a conspiracy for which petitioners contend is not essential to an indictment.

Nor was there any surprise here. The government's opening statement, as well as defendant's opening statement made immediately thereafter, disclosed that at least at that time both parties expected the government to attempt to prove that Mr. Meli's reputation in the community, a reputation as a high ranking member of organized crime with all of the implications of that association, was a contributing factor in the drivers' acquiescing in the 11% agreement. No one suggests that the variance affects defendant's right to be protected from being placed twice in jeopardy.

Because none of the policies underlying the rule were frustrated here, I would hold that the charge to the jury was not constructive amendment.

> Rather, . . . [it] constituted a variance which did not alter the crime charged, nor unfairly surprise the defendant[s], nor create an opportunity for the Government to prosecute the defendant[s] again for substantially the same offense.

United States v *De Cavalcante*, 440 F.2d 1264, 1272 (3d Cir. 1971). *See also, United States* v *Fruehauf Corp.*, 577 F.2d 1038 (6th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978), and *United States* v *Goldfarb*, 643 F.2d 422 (6th Cir. 1981), distinguishing *Stirone* v *United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).*

Alternatively, I would hold that the jury instruction does track the indictment. The indictment charges that the victim owner-drivers were forced to make their employer's contributions to the Health and Welfare and Pension Funds. The indictment further charges that "their consent [was] induced by the wrongful use of force and fear. . . ."

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* Other circuits have distinguished and limited *Stirone*. *United States* v *Thomas*, 610 F.2d 1166, 1173 (3d Cir. 1979); *United States* v *Knuckles*, 581 F.2d 305, 311-12 (2d Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978); *United States* v *Haldeman*, 559 F.2d 31, 127 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *United States* v *Cirami*, 510 F.2d 69, 72 (2d Cir.), *cert. denied*, 421 U.S. 964, 95 S.Ct. 1952, 44 L.Ed.2d 451 (1975); *United States* v *Hand*, 497 F.2d 929, 935 (5th Cir. 1974), *aff'd*, 516 F.2d 472 (5th Cir. 1975) (en banc), *cert. denied*, 424 U.S. 953, 96 S.Ct. 1427, 47 L.Ed.2d 359 (1976); *United States* v *Somers*, 496 F.2d 723, 744 (3d Cir.), *cert. denied*, 419 U.S. 832, 95 S.Ct. 56, 42 L.Ed.2d 58 (1974); *United States* v *Biondo*, 483 F.2d 635, 641 (8th Cir. 1973), *cert. denied*, 415 U.S. 947, 94 S.Ct. 1468, 39 L.Ed.2d 563 (1974); *United States* v *Smith*, 474 F.2d 844, 846-47 (3d Cir.), *cert. denied*, 411 U.S. 970, 93 S.Ct. 2162, 36 L.Ed.2d 692 (1973); *United States* v *Kenny*, 462 F.2d 1205, 1215 (3d Cir.), *cert. denied*, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972); *United States* v *Colasurdo*, 453 F.2d 585, 590-91 (2d Cir. 1971), *cert. denied*, 406 U.S. 917, 92 S.Ct. 1766, 32 L.Ed.2d 116 (1972); *United States* v *De Cavalcante*, 440 F.2d 1264, 1271-72 (3d Cir. 1971); *Jackson* v *United States*, 359 F.2d 260, 263 (D.C. Cir. 1966).

The jury instructions permitted a conviction based solely on the wrongful use of physical force to induce consent. Since threats of physical harm are encompassed in "the wrongful use of force," I would hold that the jury instructions did not amend the indictment. In holding that the words following "induced by the wrongful use of force and fear" limit the indictment to fear of unprofitable loads, the loss of their jobs, etc., the majority has unduly restricted the word "force."

The indictment is poorly drafted. While a narrow reading of this poorly drafted instrument lends support to the majority's position that the extortion was accomplished only through economic force, I believe that the grand jury would be surprised by the majority's holding that it did not charge defendant with using physical force to obtain the drivers' consent to the extortionate payments.

APPENDIX C

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

VINCENT MELI, JOSEPH D. CUSMANO, JAMES A. RUSSO, a/k/a JACK RUSSO, AND ROBY G. SMITH,
Defendants.

Criminal Action
No. 77-80488

MEMORANDUM OPINION

The indictment in this action charges in two counts conspiracy to violate the Hobbs Act; violation of the Hobbs Act by extortion; and aiding and abetting. 18 U.S.C. §§ 1951 and 2. The following fact pattern can be derived from the indictment. The J & J Cartage Company was engaged in the transportation of steel in the Eastern District of Michigan. At all times pertinent, the company was contractually bound to the International Brotherhood of Teamsters. Defendants Cusmano and Russo were 50% owners of the company. Defendant Meli was an employee, agent and labor negotiator of the company and defendant Smith was a business agent of the union assigned to represent the drivers who were employees of the company. The indictment essentially charges that the defendants conspired together to coerce the drivers to pay the company/employer contributions to the various health, pension and welfare funds by threatening the employees with unprofitable truck loads, loss of jobs, and loss of equity in their equipment. As part of said conspiracy, it is charged that the defendants caused the employees to sign a Supplementary

Agreement to the Basic Contract which authorized the company to compute the drivers' wages in such a manner that compensation would be arrived at be deducting a service charge of 11% from their gross earnings. It is further alleged to be a part of said conspiracy that defendant/representative Smith signed said agreement for and on behalf of the employees and thereafter refused to act upon grievances and complaints related thereto. The criminal acts are alleged to have taken place between the 18th of November, 1972, and the 10th of April, 1974. As a violation of the Hobbs Act, it is alleged that the aforementioned acts did obstruct, delay and affect commerce by extortionate means. Now comes all of the defendants with various motions which will be addressed individually below.

Motions of Defendants Smith, Russo, Cusmano and Meli to Quash and Dismiss the Indictment:

The thrust of the Motion to Dismiss of all of the defendants is that, assuming *arguendo* that the facts as stated in the indictment are accurate, the indictment fails to state a crime under the Hobbs Act. The defendants argue that Congress did not intend Hobbs to apply to valid labor negotiations between union and management and that the facts alleged in the instant indictment concern the legitimate re-negotiation of an existing contract, necessitated by failing economic conditions or prompted by a desire for increased profits. Additionally, defendant Smith takes the position that under no circumstances was he able to exercise threats of economic loss nor could he control whether unprofitable truck loads were tendered to the drivers — contending such decisions were solely within the control of the company. Defendants rely primarily on *United States* v *Enmons*, 410 U.S. 396 (1973).

The facts of *Enmons*, *Id.* at 397-399, show that the defendants, members and officers of various labor unions, were engaged in a legitimate strike in order to obtain higher wages

— a legitimate objective. The strike, however, was punctuated by unlawful acts of violence resulting in damage to property. The Supreme Court held that Hobbs does not apply to the use of force to achieve legitimate labor ends. *Id.* at 401. The restrictive approach used by the court avoids Hobbs liability [potentially 20 years imprisonment and/or a $10,000.00 fine] in situations where militant strikers who, in the heat of legitimate activity, might perform some illegal act which in many instances could amount to a crime under state law subject to much more lenient sanctions. *Id.* at 401. Applying this rationale, the defendants would have this court view the increased profit motive as a legitimate end, thereby negating the application of Hobbs. Hobbs, being a criminal statute, must be strictly construed and any ambiguity resolved in favor of lenity. *Rewis* v *United States*, 401 U.S. 808, 812 (1971). However, the Supreme Court has also expressly stated that the broad language of Hobbs manifests "... a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence". *United States* v *Staszcuk*, 517 F.2d 53, 59 (7th Cir. 1975), citing *Stirone* v *United States*, 361 U.S. 212 (1960); *cert. den.* 423 U.S. 837 (1975).

Defendants read paragraph 7 of Count I as the crux of the indictment. Taken alone and omitting the word "conspiracy", paragraph 7 could be facially interpreted as being descriptive of legitimate management activity, *i.e.*, an attempt to increase the employer's share of the profits. However, the inclusion of the word "conspiracy" necessarily incorporates the alleged unlawful combination which is described in paragraph 6 — and it is in this light which the profits must be viewed to test their legitimacy.

Profits may, under the appropriate facts and usual circumstances, be a legitimate objective of management. However, if the allegations of the indictment are proven, *i.e.*, if management and their negotiating agent conspired together

with the union's negotiator to coerce the employees through extortion to pay Fund contributions which, pursuant to a valid collective bargaining agreement, were to be paid by the employer, the profits lose their legitimate status. If, to the contrary, the defendants are able to show that valid bi-party negotiations took place resulting in the Supplementary Agreement, then the court could view increased profits as a legitimate objective. It is the alleged complicity of union and management to the detriment of the employees essentially muting their representative voice, which brings the present indictment within the purview of Hobbs, hence without the umbrella of *Enmons*. If the conspiracy took place, then there was no legitimate labor/management activity. Furthermore, Hobbs is directed at "racketeering", *United States* v *Yokley*, 542 F.2d 300 (6th Cir. 1976), *i.e.*, and organized conspiracy to commit the crimes of extortion or coercion. *United States* v *McGlone*, 19 F. Supp. 285, 297 (E.D. Penna. 1937). Clearly, "racketeering" and "organized crime" are difficult terms to legally define and attempts to do so could well render statutes drafted to curb their effects unconstitutional. *Cf. United States* v *Mandel*, 415 F. Supp. 997, 1018-19 (D. Md. 1976). Convictions based on anti-racketeering statutes turn upon the behavior of the perpetrator rather than his status. *Id.* at 1018. The indictment which the court is here called upon to review alleges a factual situation wherein there was no legitimate labor activity involved. The illegitimacy of the activity itself renders the benefits to be gained, *i.e.*, increased profits, illegitimate. Hence, the court cannot view the situation here as being analagous to the factual setting in *Enmons* where there was legitimate labor activity punctuated by other illegal acts. The court is therefore convinced that the behavior alleged here is the type of activity at which Hobbs was directed. The defendants' Motion to Dismiss is therefore denied.

As to defendant Smith's claim that he was not in a position to exercise threats of economic loss or control the distribution

of unprofitable truck loads, again the Motion to Dismiss must be denied based upon the well-established rule that the acts of one conspirator, in furtherance of the conspiracy are attributable to all co-conspirators. *United States v. Cimini*, 427 F.2d 129 (6thCir. 1970), *cert. den.*, 400 U.S. 911 (1970); *United States v. Gomez*, 529 F.2d 412 (5th Cir. 1976); *United States v. Bernstein*, 533 F.2d 775 (2nd Cir. 1976).

Defendant Meli also moves to dismiss based on the fact that there were unauthorized persons in the grand jury room at the time the jury was either taking testimony or during its deliberations, in violation of the secrecy obligation, Rule 6(e), F.R.Crim.P. Specifically, Meli claims that the Rule was violated by the appearance of one Craig Woodhouse, an investigator of the Department of Labor. At the hearing on the Motions to Dismiss, Mr. Woodhouse was put on the witness stand and there was not testimony elicited which would lead the court to believe that he was in the grand jury room at any time other than when he appeared as a witness. Therefore, Meli's Motion to Dismiss on this ground is denied.

Motion to Dismiss Count I of the Indictment by Defendant Cusmano:

Here, Cusmano attacks two particular paragraphs of Count I. In ¶6, the indictment speaks to. . . . . by threats of economic loss, [i.e.], the defendants did force the drivers. . . to pay the . . . employer contributions to the Funds *with their consent* induced by the wrongful use of force and fear. . . ", whereas ¶11 alleges that the defendants caused the drivers to " . . . pay the company employer contributions to the Fund *without their consent*". (emphasis added). It is the defendants' position that the two averments are duplicitous because ¶6 describes extortion while ¶11 describes robbery, both of which are defined by the Hobbs Act.

The prohibition against duplicity protects the defendant's rights under the Sixth Amendment to be apprised of the nature and cause of the accusation against him so that he may properly prepare his defense. 8 *Moore's Federal Practice* ¶8.03[1] (2d ed. 1976). It also protects against double jeopardy so that, in the event of a subsequent prosecution, the basis of the verdict in the original prosecution will be known. *Id.*; *United States* v *UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). Duplicity is not to be confused with charging the commission of a single offense by different means.

The thrust of Count I here is conspiracy. The fact that different paragraphs of the Count talk of different means of carrying out the conspiracy does not make the Count duplicitous. The conspiracy itself is the crime — not the offenses that the defendants have allegedly combined to commit. *Braverman* v *United States*, 317 U.S. 49, 53-54 (1942); *United States* v *Papia*, 399 F. Supp. 1381, 1387 (E.D. Wisc. 1975).

Notwithstanding the aforementioned rationale, it is the government's position that the word "without" in ¶11 is a typographical error and the phrase should actually read "with their consent". Further, the government adds that the phrase is surplusage and may be stricken from the indictment in its submission to the jury.

In both Counts and all paragraphs, save the last phrase of paragraph 11, the indictment is consistently drafted in terms of extortion. It is true that if paragraph 11 is closely read and the last phrase, "without their consent", is included, the paragraph could well imply that robbery was the means utilized to effectuate the plan of the alleged conspiracy. The court feels that the proper remedy here is to strike the phrase as surplusage in order to avoid an inconsistency and potential confusion. Such a remedy could in no way prejudice the defendants. If anything, it simplifies their task in preparation

for trial, and ultimately limits the government's proofs as to the means of effectuating the alleged plan. Accordingly, Cusmano's Motion to Dismiss is denied and the phrase "without their consent" at the conclusion of paragraph 11 will be stricken from the indictment in the submission to the jury.

Motion to Sever of Defendant Smith from All Other Defendants:

Smith moves pursuant to Rule 14, F.R.Crim.P., to sever his trial from that of all the other defendants based on the claim that to be tried with the other defendants will preclude him from calling the other defendants as witnesses on his behalf. On such a motion, the moving defendant has the difficult burden of demonstrating that he is sufficiently prejudiced to warrant severance. It is the duty of the court to exercise its discretion in weighing the interest of the public in avoiding a multiplicity of litigation against the interest of the defendant in having a fair trial. The fact of antagonistic, though inherently prejudicial, is, of itself, insufficient to merit severance. *United States v. Abrams*, 29 FRD 178 (S.D. N.Y. 1961). It is the claim of the government that, at this time, there is no *Bruton* problem. *United States v. Bruton*, 391 U.S. 123 (1968). The bald allegation that the co-defendants would be willing to testify in exculpation of the moving defendant is, of itself, insufficient to merit severance. *Cf. Branch v. United States*, 505 F.2d 139 (7th Cir. 1974); *United States v. Abraham*, 541 F.2d 1234 (7th Cir. 1976). Accordingly, defendant Smith's motion to sever is denied without prejudice, subject to an actual showing to the court that the co-defendants will be willing to testify for him in an exculpatory fashion, or upon the arising of a *Bruton* problem.

Motion to sever of Defendant Cusmano from All Other Defendants:

It is the position of Cusmano that he will proffer evidence that the alleged conspiracy involved solely and exclusively all of the other defendants. Such a theory, in the court's view, would pit Cusmano against the three other defendants with a mutually exclusive defense. This position would rise to a level of prejudice greater than mere hostility or conflict and, in the court's view, merits severance. *United States v Harris*, 542 F.2d 1283 (7th Cir. 1976); *United States v Perez*, 489 F.2d 51 (5th Cir. 1973); *United States v Valdez*, 262 F. Supp. 474 (D. PR 1967). Accordingly, defendant Cusmano's Motion to Sever is granted. This ruling obviates the need to consider the Motion to Sever of defendant Meli for it essentially gives him the relief for which he has prayed in his Motion to Sever.

Motion for Bill of Particulars of Defendants Meli and Cusmano:

The defendants here ask for a Bill particularizing overt acts; the times, dates and places of relevant conversations in which they participated and in whose presence they were made, with the names and addresses of such persons; the names and addresses of co-conspirators who have become known to the government since the time of the indictment; a description of what they did in furtherance of the alleged conspiracy; the manner, time, place and date in which they used extortionate means to force the drivers to pay the employer contributions to the Funds; what acts, deeds or words the government will rely on to prove the allegations of Count II; and what events, facts, conduct or circumstances Count II is based upon.

The purpose of a Bill of Particulars is to effectuate the apprising requirement of the Sixth Amendment and the double jeopardy protection of the Fifth Amendment. *Wong Tai v United States*, 273 U. S. 77, 80 (1927). Exercising its discretion,

the court must seek to avoid freezing the government's proofs in advance of trial and, at the same time, protect the defendants against surprise. *Moore's Federal Practice* ¶ 7.06 [1] (2d ed. 1976). The degree of the complexity of the case is also an ingredient for the court to take into consideration. *United States v. Ostrosky*, 125 F. Supp. 190 (D. D.C. 1954).

In light of the apparent complexity of this case and the length of time covered by the indictment, some 17 months, it is the position of the court that particulars should be provided in the following regard. The government is to provide all of the defendants, not merely the moving defendants, with a description of the overt acts which it intends to prove at trial. The Bill may be amended as to these particulars up until two weeks in advance of trial. Further, the government is to provide the names of any unindicted co-conspirators of whom they have knowledge and are unknown to the defendants. *See, United States v. Anderson*, 368 F. Supp. 1253 (D. Md. 1973). Accordingly, the defendants' Motions for a Bill of Particulars are granted as noted and denied in all other respects.

Motions of Defendants Meli, Smith and Cusmano for Discovery and Inspection:

Defendants Meli and Smith filed identical Motions for Discovery and Inspection. Because defendant Cusmano's discovery requests were substantially similar to several of those in the motions filed by defendants Meli and Smith, the government filed a single response. Insofar as the Motions for Discovery and Inspection are alike, this opinion applies to each defendant's requests.

Defendants demand a list of all government witnesses that the government intends to call at trial. The government has declined to furnish such a list, citing *U. S. v. Cowles*, 432 F. 2d 804 (6th Cir. 1970), *cert. den.* 400 U. S. 968 (1970). In *Cowles*, the court flatly stated that the names of government witnesses

are not discoverable under Rule 16, F. R. Crim. P. *Id.* at 910. Accordingly, this court will not require the government to give defendants the requested witness list.

The defendants also ask for all statements made by any co-defendant. Although the government has provided defendants individually with their statements as made to the government, it declines to furnish each defendant with their co-defendants' statements. Rule 16 does not, in its terms, cover the discovery by one defendant of the statement or confession of a co-defendant. This court, therefore, will not require the production of such statements, although it will not stop cooperating co-defendants from exchanging statements.

The government has also declined to give defendants the grand jury testimony of co-defendants and of any witness who will be asked to testify at trial on the government's behalf. The well-established rule imposing the utmost secrecy on grand jury proceedings is sufficient reason for this court to deny defendants' discovery of the grand jury material they seek.

An additional reason exists for denying defendants the grand jury testimony of government witnesses. The Jencks Act, 18 U.S.C. § 3500, has been held to be the exclusive vehicle for disclosure of statements made by government witnesses, and it provides that the prosecution cannot be compelled to disclose statements of the witness before he has testified on direct examination. *U.S. v Percevault*, 490 F.2d 126 (2nd Cir. 1974). Since the 1970 Amendment to the Act, bringing grand jury testimony under the Act, pretrial discovery of grand jury testimony is also prohibited. *See "Moore's Federal Practice* ¶16.10[2] (2d ed. 1976).

The defendants have also requested pretrial discovery of all evidence in the government's possession which tends to exonerate or exculpate the defendants. Defendants state that *Brady v Maryland*, 373 U.S. 83 (1963), requires as much. The

government argues that Brady imposes no *pretrial* obligation on the government. Although the *Brady* doctrine developed in the context of disclosure at trial, courts have recognized that there exists "instances where disclosure of exculpatory evidence for the first time during trial would be too late to enable the defendant to use it effectively in his own defense . . ." *U.S. v Cobb*, 271 F. Supp. 159, 163 (S.D. N.Y. 1967). This court, being in agreement, will order the government to provide the defendants with any *Brady* material that may exist. This directive includes the disclosure of Jencks Act type statements on the theory that the Jencks Act must accommodate the demands of due process. *U.S. v Gleason*, 265 F. Supp. 880, 887 (S.D. N.Y. 1967). Accordingly, the defendants' Motions for Discovery and Inspection are granted insofar as *Brady* material is concerned and denied in all other respects.

An appropriate order will be entered by the court.

/s/ LAWRENCE E. GUBOW

Lawrence Gubow
U. S. District Judge

Dated: July 18, 1977

APPENDIX D

UNITED STATES DISTRICT COURT
for
EASTERN DISTRICT OF MICHIGAN

Docket No. 77-80488

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date. September 1, 1982.

WITH COUNSEL, Neil Fink.

There being a verdict of guilty.

Defendant has been convicted as charged of the offense(s) of Conspiracy to Interfere with Interstate Commerce by Extortion Title 18 Section 1951; Conspiracy to Interfere with Interstate Commerce by Extortion and Aiding and abetting Title 18 Sections 1951 & 2.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) years, as to count one and three (3) years as to count two. The sentence imposed on count two is to run concurrently with the sentence imposed on count one.

IT IS FURTHER ORDERED that the defendant pay a committed fine, for the use and benefit of the United States, in

the amount of $2,500.00 as to count one and $2,500.00 as to count two. *The total fine being $5,000.00.*

IT IS FURTHER ADJUDGED that the appearance bond stand as bond pending appeal.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

Date: September 1, 1982